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No. 01-1324

IN THE
Supreme Court of the United States

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department,
Petitioners,

v.

Déjà vu of Nashville, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONERS

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18 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Sup. Ct. Rule 37.2(b), *amicus* International Municipal Lawyers Association (IMLA) move for leave to file the attached *amicus curiae* brief in support of the Petition for a Writ of Certiorari, seeking review of *Déjà Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001).

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. It is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. The confusion in the lower courts over the meaning of the "prompt judicial review" requirement for content-neutral licensing regulations has resulted in the unwarranted invalidation of numerous local ordinances for reasons that are beyond cities' control and that are inconsistent with this Court's rulings on time, place, and manner regulations. IMLA, as an organization advocating the interests of local governments, seeks leave to file the attached brief on behalf of its members nationwide.

This motion is necessary because Respondents have declined to consent to the filing of this *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF AMICUS*

* Pursuant to Rule 37.6, *amicus curiae* International Municipal Lawyers Association discloses that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case lies in the efforts of its member cities and counties to control the adverse secondary effects of sexually oriented businesses through narrowly tailored licensing regulations. IMLA, as an organization advocating legal issues on behalf of local governments, files this brief on behalf of its members nationwide.

STATEMENT

This case presents an important question of constitutional law warranting this Court's intervention. The confusion in the lower courts since *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), has resulted in the unwarranted invalidation

of numerous local ordinances for reasons that are beyond cities' control and that are inconsistent with this Court's rulings on time, place, and manner regulations.

The common law writ processes operative in many states and, therefore, in a myriad of local ordinances (not only adult business ordinances), have repeatedly fallen subject to the "prompt judicial review" controversy. The widespread use of common law certiorari and mandamus for review of various administrative decisions – any of which could be challenged on constitutional grounds – makes the controversy particularly suited for this Court's resolution. A brief review of reported cases demonstrates the frequency with which this issue has arisen:

- *11126 Baltimore Blvd. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (en banc) (holding that Maryland's common-law writ of certiorari procedure fails prompt decision requirement)
- *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2000) (concluding that the common law writ of certiorari procedure in Illinois satisfies the First Amendment)
- *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000) (finding Kentucky common law writ of certiorari insufficient)
- *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4th Cir. 1999) ("North Carolina's common law writ is a 'simple and expeditious' way to obtain judicial review.")
- *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (Nevada writ of mandamus procedure fails prompt judicial decision test)
- *Blue Moon Enterprises, Inc. v. Pinellas County Dep't of Consumer Protection*, 97 F.Supp.2d 1134 (M.D. Fla. 2000) (Florida common law writ of certiorari satisfies prompt judicial review)

- *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999) (California writ of mandamus procedure insufficient)
- *T Backs Club, Inc. v. Seaton*, 84 F.Supp.2d 1317 (M.D. Ala. 2000) (upholding ordinance lacking explicit judicial review provision, where plaintiffs had numerous common law remedial writs and Alabama statutory processes for challenging ordinance)
- *Nightclub Mgmt., Ltd. v. City of Cannon Falls*, 95 F.Supp.2d 1027 (8th Cir. 2000) (Minnesota writ of certiorari fails prompt judicial decision)
- *Gasparo v. City of New York*, 16 F. Supp. 2d 198 (E.D. N.Y. 1998) (New York's codification of common law writ process, Article 78, likely satisfies prompt judicial review)
- *Pennsylvania Pride, Inc. v. Southampton Twp.*, 78 F.Supp.2d 359 (M.D. Pa. 1999) (Pennsylvania mandamus action fails to provide prompt judicial decision)
- *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995) (Colorado's administrative review process satisfies First Amendment by providing prompt access to court)

The recurring nature of the prompt judicial review issue justifies the granting of certiorari to provide cities with clarification based on this Court's precedents.

Twenty-six years ago, the Court decided its first case concerning local zoning and licensing controls employed to prevent the "admittedly serious problems" caused by sexually oriented businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1974). Rejecting the adult theaters' assertion that Detroit's licensing requirement constituted an impermissible prior restraint, a majority of the Court concluded that the city's classification of theaters specializing in erotic fare was justified by the city's desire to

control the adverse impacts of those commercial enterprises. *Id.* at 62-63.

Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court reiterated that such classification was necessary to ensure that the city's regulation was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." *Id.* at 52.

Next, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), a plurality of this Court applied traditional prior restraint analysis – originally created to deal with content-based censorship, *Freedman v. Maryland*, 380 U.S. 51 (1965) – to a content-neutral time, place, and manner regulation designed to control the secondary effects of sexually oriented businesses. Recognizing that the Dallas ordinance was "significantly different from the censorship scheme examined in *Freedman*" because "the city does not exercise discretion by passing judgment on the content of any protected speech," the plurality split the *Freedman* test and decided that some, but not all, of the *Freedman* standards applied. *Id.* at 229-230. The Court invalidated the ordinance for vesting unbridled discretion, in the form of potential delay, in city officials and for failure to provide "an avenue for prompt judicial review" in the event of a license denial. *Id.* at 229.

To clarify the meaning of "prompt judicial review," the Court granted certiorari in *Thomas v. Chicago Park District*, 122 S. Ct. 775 (2002), but ultimately concluded that the controversy was not presented by the case. In *Thomas*, the Court evaluated another time, place, and manner licensing regulation and unanimously rejected traditional prior restraint analysis on the grounds that censorship was not at issue. *Id.* at 779. "The Park District's ordinance does not authorize a licensor to pass judgment on the content of

speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.*

Although traditional prior restraint analysis did not apply, this Court in *Thomas* reiterated its longstanding requirement "that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 780. The Court then ruled that the ordinance provided objective criteria to guide licensing decisions and offered the necessary access to judicial review by writ of common-law certiorari in the Illinois courts. *Id.* at 781.

IMLA contends that this Court's ruling in *Thomas* offers a coherent solution to the split in the circuits and should guide its resolution of this case. Specifically, IMLA urges the Court to grant certiorari and rule that content-neutral time, place, and manner regulations for sexually oriented businesses are constitutional provided that they avoid unfettered discretion (including undue delay), allow prompt *access* to judicial review, and otherwise meet the requirements of the time, place and manner test. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

REASONS FOR GRANTING THE WRIT

1. This case squarely presents the question upon which the lower courts have split, namely, whether content-neutral licensing ordinances regulating the time, place, and manner of sexually oriented businesses must provide "prompt access to judicial review" from a license denial, or whether such regulations must also guarantee that the court will decide the merits of the action within a certain number of days.

The Nashville ordinance provides that any adverse licensing decision "may be immediately appealed" by writ of common-law certiorari in the Tennessee courts; indeed, under Chapter 6.54.040(E)(2), an applicant is not even required to exhaust administrative remedies before seeking judicial review. This quick release from the administrative process, coupled with immediate access to an independent

judicial officer, provides an adequate bulwark for First Amendment rights in cases like this, where censorship is not involved and the government interests at stake are "undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000).

Whether the bulwark of "prompt access to judicial review" is constitutionally sufficient is squarely presented by the petition, notwithstanding the Sixth Circuit's emphasis on whether Tennessee's common-law writ for certiorari is "discretionary." The plain fact of the matter is that a judge must review a petitioner's constitutional claims in order to decide whether the common-law writ of certiorari should issue. *See, e.g., Arnold v. Tennessee Board of Paroles*, 956 S.W.2d 478 (Tenn. 1997) (reversing dismissal of a petition for common law writ of certiorari where petitioner inmate had stated an Establishment Clause violation).

This judicial review is the functional equivalent of that provided in Illinois by the writ of common-law certiorari deemed sufficient in *Thomas*. 122 S. Ct. at 781; *see Stratton v. Wenona Community Unit School District*, 551 N.E.2d 640 (Ill. 1990) (noting that the issuance of a writ of certiorari is within the discretion of the court). In this case, "no one is suggesting that licensing decisions are not subject to immediate appeal to the courts." *FW/PBS, Inc.*, 493 U.S. at 248 (White, J., concurring in part and dissenting in part). Moreover, the available avenues for challenging Nashville's regulations are not limited by the ordinance. "A person always has a judicial forum when his speech is allegedly infringed ... The 'safeguards' or the absence thereof neither expand nor detract from the courts' jurisdiction over constitutional questions." *Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993) (en banc).

Even if the Sixth Circuit's view of Tennessee law – that the trial court may decline to grant certiorari where constitutional issues are raised – is correct, the Nashville ordinance stays licensing decisions adverse to existing businesses pending resolution on the merits by the reviewing court. Thus, a decision by the trial court to not grant

certiorari results in a perpetual stay of the adverse administrative decision, and the business prevails. Pet. App. 33a n.8; see also *id.* 40a (Wellford, J., dissenting). In such a circumstance, an adult business's only complaint is that its appeal was not promptly decided by a court; this grievance is the essence of the circuit conflict and warrants the granting of the Petition.

2. The question presented is an important one to IMLA's membership, because the "prompt judicial determination" requirement is legally unworkable, substantially restricts cities' rights to control secondary effects, and has created an ongoing affront to federal-state relations.

First, it is beyond cavil that cities are powerless to require judicial decisions from courts within a specified number of days. As the Sixth Circuit has previously noted, "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000). Nevertheless, this unworkable requirement has led to invalidation of municipal ordinances based upon illogical rationales. For example, the federal court in *Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. LEXIS 13477 (E.D. Cal. 1999), following the prompt determination requirement announced in the Ninth Circuit, stated:

> This court has no doubt that a state or federal trial judge, if presented with an application for temporary restraining order, or a motion for preliminary injunction, would exercise his or her duty to "dispose promptly" of the application or motion. Code of Judicial Conduct, Canon 3. However, Freedman and Baby Tam & Co. plainly demand that the Ordinance provide greater assurance than that.

Id. at *23.

The unworkable nature of the prompt determination requirement was not lost on the court:

> In demanding this greater assurance, Freedman and Baby Tam & Co. may impose an impossible

> burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California Legislature could do so – at least with respect to state judicial officers – but even the state's authority is doubtful.

Id.

In *Mai Lee Le*, the Legislative Counsel of California had opined that a state law requiring a decision within 90 days of a petition for writ of mandamus seeking judicial review of a license denial would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, Freedman and Baby & Tam Co. insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – however impractical they may be – are the law. Accordingly, this court has no alternative but to conclude that plaintiffs have shown a probability of succeeding on the merits of their claim that the Ordinance fails to provide for a prompt judicial determination of the merits of a decision to deny an Adult-Oriented Business or Employee License.

Id. at 24.

As this Court clarified in *Thomas*, the First Amendment does not require such absurd results. Under *FW/PBS*, a city is not required to initiate litigation to defend its denial of a license. 493 U.S. at 230. Neither should a city be required to specify a deadline for judicial determination of an appeal of a license denial. Such a deadline is logical only where – as the Court has ruled in censorship cases – the government is required to initiate the court action and the private party remains passive. In such cases, the deadline forces the government to quickly pursue resolution of the case. However, where the adult business initiates litigation (as *FW/PBS* envisioned), the business can request – and has the incentive to request – emergency relief or expedited

proceedings. On the other hand, circuits requiring cities to guarantee prompt judicial decisions have reversed the contemplated incentives and have required cities to bear the entirety of the judicial review burden.

Second, the "prompt judicial determination" rubric has led to a gross diminution – far beyond that contemplated by *FW/PBS, Inc.* – in the ability of local governments to control sexually oriented enterprises and their corresponding secondary effects.

The practical effect of requiring a judicial deadline is to require cities to issue permits whenever courts fail to decide adult business cases on time. *See Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000) ("For example, an ordinance could provide that a license shall issue if a reviewing court fails to reach a decision within a reasonably brief period of time.") Thus, cities are compelled to issue permits to applicants despite the fact that they are not eligible for such permits under content-neutral, narrowly tailored regulations. For example, under Nashville's ordinance – which incorporated the *Paducah* solution to no avail – licenses would have to issue to persons recently convicted of crimes including rape, prostitution, promoting prostitution, and sexual exploitation of a minor. Pet. App. 140a. Similarly, applicants in violation of the locational requirements of the zoning code, or whose premises are in violating of local health regulations, would also have to be licensed. Pet. App. 142a.

IMLA's concern over this anomaly is heightened due to recent expansion of the "prompt judicial determination" doctrine to encompass license renewals, suspensions, and revocations which, by definition, are restraints imposed *subsequent* to, not prior to, expressive activity.

In *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), this court reiterated the fundamental distinction between prior restraints and post-permit enforcement of content-neutral regulations:

> Full briefing and argument have revealed that the question City News tendered, and which we took up

> for review, is not now and never was accurately reflective of City News's grievance. Unlike the initial license applicant whose expression cannot begin prepermission (the situation of the complainant in *Freedman*), City News was already licensed to conduct an adult business and sought to fend off a stop order.

Id. at 285.

This distinction has been thoroughly developed in this Court's precedents. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Nevertheless, lower courts have expanded the prompt decision rule in sexually oriented business cases to the detriment of cities. In *City of Paducah, supra*, for example, the judicial deadline requirement caused the Sixth Circuit to conflate the first two prongs of *Freedman*:

> We recognize that, as a practical matter, the requirement of prompt judicial review means that a city seeking to impose a licensing scheme must take certain steps to avoid constitutional infirmities. Specifically, a city may very well have to go beyond merely maintaining the status quo and actually permit the communication of protected expression until a judicial decision is rendered on a matter.

202 F.3d at 894; *compare East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995) ("The status quo for a business seeking a permit to begin operating a sexually oriented business, however, is non-operation. The city, therefore, does not need to allow operation pending review.")

Similarly, in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999), the Ninth Circuit concluded that the prompt judicial determination requirement applies not only to license denials, but also to license suspensions and revocations – *subsequent* restraints enforced against businesses violating content-neutral regulations. Guided by "the policy consideration underlying this safeguard," the court concluded that it "must determine how to best further

that policy in applying the judicial review safeguard to a license suspension or revocation." *Id.* at 1115. Following the *prior* restraint rationale of *Freedman*, the court stated: "In pursuing this goal, we conclude that we must extend *Baby Tam*'s requirement of an opportunity for a prompt hearing and decision by a judicial officer in license denial cases to license suspensions or revocations as well." *Id.*

Perhaps the most egregious misapplication of the prompt judicial determination doctrine is in the case at bar, where there is no restraint at all because adverse administrative decisions are stayed pending judicial review. The Nashville ordinance provides that if respondents appeal, an adverse administrative decision "shall not take effect until that decision has been upheld by the court after adjudication *on the merits*." See Ord. §§ .040(E)(3) (emphasis added), and .070(D)(3). Nevertheless, the Sixth Circuit deemed this extraordinary safeguard insufficient under *Freedman*. Pet. App. 33a n. 8.

Finally, the underlying current in many of the cases requiring "prompt judicial decision" – including the Sixth Circuit's opinion below – is that state courts are less than competent to act swiftly when constitutional rights are threatened. Indeed, the Sixth Circuit in *City of Paducah* had previously stated that "we cannot be sure that a state judge, *who often is elected* and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." 202 F.3d 884, 892 (6th Cir. 2000) (emphasis added) (rejecting district court's assumption that state court would speedily issue injunctive relief if risks to constitutional rights made it necessary).

Such presuppositions, expressed in the "prompt judicial decision" requirement, are inherently likely to cause unnecessary friction in federal-state relations. This is because the rule entails "an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the

United States." *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974).

Each of these concerns stemming from the prompt judicial review quandary represents an impediment to IMLA's members as they attempt to protect the quality of life in their communities. The confusion in the circuits, the diminished ability of cities to control secondary effects, and the expanded application of inapposite precedents to strike local ordinances all weigh heavily in favor of granting certiorari.

CONCLUSION

For the foregoing reasons, your *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

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